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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

LOCAL UNION NO. 229, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

versus

AFFILIATED FOOD DISTRIBUTORS, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

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No.

LOCAL UNION NO. 229, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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Petitioner, Local Union No. 229, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit vacating the stay order pending arbitration entered by the United States District Court for the Middle District of Pennsylvania upon the motion filed by Petitioner, Local Union No. 229.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 483 F. 2d 418 and appears at Appendix A, *infra*, pp. 9-18. The Memorandum and Order of the United States District Court for the Middle District of Pennsylvania is unreported and appears at Appendix B, *infra*, pp. 19-25.

JURISDICTION

The Opinion of the Court of Appeals was filed on August 14, 1973. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1). Federal jurisdiction of the underlying cause of action is based upon 29 U.S.C. § 185.

QUESTION PRESENTED

Do the strong federal policy favoring arbitration of collective bargaining agreement disputes and this Court's acknowledgement that a collective bargaining agreement is not an ordinary contract require the courts to eschew traditional principles of contract interpretation in favor of more liberal rules for interpreting collective bargaining agreements in determining whether an employer is bound to submit to arbitration its claim for damages arising from a union's alleged breach of a contractual no-strike provision?

STATUTE INVOLVED

This case involves Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), which provides as follows:

> Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

Petitioner Local Union No. 229, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Respondent Affiliated Food Distributors, Inc. were parties to a Collective Bargaining Agreement which was in effect from May 3, 1969 to May 3, 1972. Said Collective Bargaining Agreement contained the following provision which is the subject matter of this case:

"ARTICLE XXIII–ARBITRATION

"Any difference, grievance, or dispute between the Company and the Union arising out of, or relating to this Agreement, or its interpretation or application, or the enforcement thereof, except as otherwise specifically provided herein, shall be subject to the following procedures:

"A. Any grievance which arises may be taken up by the Union Steward(s) with a representative of the department involved, or with an official of the Company. Grievance must be presented in writing.

"B. In the event that the grievance shall not have been resolved within three (3) working days, the Business Representative of the Union shall take the subject matter up with the Employer. If the Business Representative of the Union and the Employer cannot reach a satisfactory agreement within three (3) working days, the subject matter shall be referred to arbitration immediately. The arbitrator may be selected by mutual agreement between the Company and the Union. If no agreement is reached on the selection of the arbitrator within five (5) days, the arbitrator shall be selected from a panel of the American Arbitration Association.

"It is to be clearly understood that the arbitrator shall not have the power to alter any of the terms of the Agreement. Decisions of the Arbitration Board shall be final and binding on both parties. Pending the decision of the Arbitration Board, the Union will not permit any strikes or interference with the regular routine of business.

The cost of the Arbitrator shall be borne equally by the parties to this Agreement."

From November 1 through November 3, 1971, certain members of Petitioner, employed by Respondent and covered by the above-mentioned Collective Bargaining Agreement, engaged in a stoppage of work. On November 18, 1971, Respondent filed in the United States District Court for the Middle District of Pennsylvania an action for damages, alleging that the work stoppage constituted a breach of the no-strike provision contained in the above-quoted contract provision. The action against Petitioner was filed pursuant to Section 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 185(a). On July 10, 1972, the district court granted Petitioner Union's motion to stay the damage action pending arbitration of the substantive issues of the damage action, i.e., whether the Union violated the no-strike provision and, if so, the compensable damages resulting therefrom, pursuant to the above-quoted arbitration provision. In so ruling, the court resolved any doubt or uncertainty as to the scope of the arbitration provision in favor of arbitrability, pursuant to this Court's broad directive in *United Steelworkers of America* v. *Warrior and Gulf Navigation Company*, 363 U.S. 574 (1960).

Pursuant to Respondent's appeal from the interlocutory order, on August 14, 1973, a divided court of appeals vacated the stay and remanded the case for further proceedings in the district court. The majority opinion relied upon "traditional principles of contract interpretation" in concluding that the parties did not intend the arbitration clause to cover disputes of this kind. The dissenting opinion correctly noted that in the absence of explicit language either including or excluding a particular dispute from arbitration, the admonition of *Warrior and Gulf* required the courts to eschew the "rules of contract construction applicable in a normal commercial context . . . in the interpretation of the arbitration clause of a collective bargaining agreement" so that where an ambiguity exists, as in this case, the provision must be interpreted in favor of arbitration.

REASONS FOR GRANTING THE WRIT

This case presents the issue of a developing trend by lower courts repudiating the admonitions and guidelines of *Warrior and Gulf* in their reliance on traditional principles of contract interpretation in determining the arbitrability of an employer's claim on a union's alleged breach of a contractual no-strike provision.[1] This developing trend ignores the fundamental, substantial distinctions and differences between "ordinary contracts" and collective bargaining agreements, as well as the necessarily different rules of construction that must be applied. This Court clearly recognized in *Warrior and Gulf* that a collective bargaining agreement "is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." 363 U.S. at 578. This view that "a collective bargaining agreement is not an ordinary contract" was reaffirmed in *Wiley* v. *Livingston*, 376 U.S. 543, 550 (1964).

Acknowledging the different character of collective bargaining agreements and in furthering the strong federal policy in favor of arbitration, this Court explicated the following liberal rules of construction to be applied in determining whether a dispute should be submitted to arbitration under a collective bargaining agreement:

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage . . . . We think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail . . . . [Emphasis added.] *Warrior and Gulf, supra*, 363 U.S. at 582-585.

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1. *Firestone Tire and Rubber Co.*, v. *Rubber Workers*, 476 F. 2d 603 (5th Cir. 1973); *G. T. Schjeldahl Co.* v. *Local Lodge 1680*, 393 F. 2d 502, 505 (1st Cir. 1968); *Boeing Co.* v. *International Union*, 370 F. 2d 969 (3rd Cir. 1967); *Illinois Bell Telephone Co.* v. *Local Union No. 399*, 330 F. Supp. 303 (S.D. Ill. 1971).

The Court strikingly demonstrated that different, more liberal rules of interpretation applied in cases involving arbitration provisions of collective bargaining contracts in binding to a contract an unconsenting successor while conceding that the principles of law governing ordinary contracts would not require such a result. *Wiley, supra*, 376 U.S. 543, 550. "When a contract is scrutinized for evidence of an intention to arbitrate a particular kind of dispute, *national labor policy* requires, within reason, that 'an interpretation that covers the asserted dispute,' *Warrior and Gulf, supra*, pp. 582-583, be favored." *Wiley*, at 550, n. 4.

It is that national labor policy that the court of appeals in the instant case ignored and frustrated in applying its standard of "traditional principles of contract interpretation":[2]

> The principle that doubt should be resolved in favor of arbitration does not relieve a court of the responsibility of applying traditional principles of contract interpretation in an effort to ascertain the intention of the contracting parties. When a contract, fairly read with these principles in mind, is susceptible of a construction that dictates arbitration, the congressional policy favoring that form of dispute resolution may require the denial of judicial relief despite the possibility of fairly reading the contract to evidence a contrary intent. But there is no occasion to resort to this congressional policy in a case where the contract, fairly read as a whole, is not susceptible of a construction that the parties bound themselves to arbitrate the dispute before the court. We conclude that this is such a case. [Emphasis added.] (Appendix A, pp. 12-13)

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2. The court's selection of the phrase "may require the denial of judicial relief despite the possibility of fairly reading the contract to evidence a contrary intent" reflects the "hostility" of courts to arbitration that was referred to by this Court in *Warrior and Gulf*, 363 U.S. at 578. Furthermore, as to the reference to "denial of judicial relief," the district court in the instant case correctly noted that *Drake Bakeries* v. *Bakery Workers*, 370 U.S. 254 (1962), does not require a dismissal of the Section 301 damage suit but only a stay pending arbitration. (Appendix B, p. 23, n. 3)

This standard clearly falls far short of the broad rules of interpretation favoring arbitration mandated by *Warrior and Gulf*. Furthermore, as reflected above, the majority opinion specifically disavowed consideration of the congressional policy favoring arbitration in its interpretation of the arbitration provision in the instant case, which disavowal directly conflicts with the basic underlying rationale of *Warrior and Gulf*.

The court of appeals in the instant case, as well as other lower courts,[3] have departed from the teachings of *Warrior and Gulf* by placing undue emphasis upon this Court's statement in *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 241 (1962), that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit" to the exclusion of the presumption in favor of arbitrability set forth in *Warrior and Gulf*. The misplaced emphasis on this language overlooks the fact that this admonition was lifted from the majority opinion in *Warrior and Gulf*. 363 U.S. at 582. In misreading *Atkinson*, these courts have failed to consider that *Atkinson* presented a "clear" situation of a specific exclusion from arbitration, which obviated the necessity for this Court to rely upon the liberal rules of construction or presumption of arbitrability. *Atkinson, supra*, 370 U.S. at 241. Similarly, this Court found that the broad inclusive language of the arbitration provision in *Drake* "easily" covered the employer's claim of the union's violation of the no-strike clause, again without the necessity of the Court invoking or relying upon liberal rules of construction or a presumption in favor of arbitrability. *Drake Bakeries, supra*, 370 U.S. at 258. Such rules and presumptions obviously come into play only in the more difficult cases where the arbitration provisions lack the exclusion or inclusion type of language found in *Atkinson* and *Drake*, respectively. This is precisely the type of case for which this Court established liberal rules of construction where "doubts should be resolved in favor of coverage." *Warrior and Gulf, supra*, 363 at 583. However, the lower courts[4]

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3. See footnote 1.

4. *Ibid.*

appear reluctant to apply those rules in determining the arbitrability of an employer's claim of a union's breach of a no-strike provision.

CONCLUSION

The granting of this Writ is necessary for this Court to reaffirm the continuing validity of the instructions of *Warrior and Gulf* and to confirm the application of those instructions to the issue of the arbitrability of an employer's claim that a union violated the contractual no-strike provision. A resolution of these issues is necessary to the proper development of the "federal common law" under Section 301, which consideration presumably prompted the Court to grant certiorari in another case from the Third Circuit involving arbitrability under Section 301 of the Labor Management Relations Act. *Gateway Coal Co.* v. *United Mine Workers*, 466 F.2d 1157 (3rd Cir. 1972), *cert. granted*, ____ U.S. ____, 93 Sup. Ct. 1157 (1973).

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

John J. Dunn, Sr.
Attorney for Petitioner

November 12, 1973

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-1855

AFFILIATED FOOD DISTRIBUTORS, INC.,
Appellant,

v.

LOCAL UNION No. 229, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Appellee.

(D.C. Civil Action No. 71-513)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Submitted May 24, 1973

Before: ALDISERT and ADAMS, *Circuit Judges;* and STAPLETON, *District Judge.*

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OPINION OF THE COURT

(Filed August 14, 1973)

STAPLETON, *District Judge.*

The sole question on this appeal is whether the appellant-employer is bound to arbitrate its damage claim against the appellee-union for breach of a no-strike clause. Appellant, Affiliated Food Distributors, Inc. ("Affiliated") brought this action pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C.A. § 185 (1965). On motion of the appellee, Local Union No. 229, the district court ordered a stay of the action pending arbitration. Affiliated appealed from this interlocutory order,[1] and urges that the collective bargaining agreement between the parties does not require arbitration of its damage claim. We agree and reverse.

There is a clear congressional policy favoring private, extra-judicial resolution of labor-management disputes.[2] In furtherance of this policy, the Supreme Court of the United States issued the following mandate in *United Steel Workers of America v. Warrior and Gulf Nav. Co.*, 363 U.S. 574, 582 (1960):

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

However, even in the presence of this clear congressional policy, it remains the rule that parties are bound to arbitrate only those disputes which, under a fair construction of their collective bargaining agreement, they have bound themselves to arbitrate. As the Supreme Court noted

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1. 28 U.S.C.A. § 1292(a).
2. 29 U.S.C.A. § 171 (1965).

in *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962):

> Under our decisions whether or not the Company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties. . . . '[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'

At the heart of this matter, therefore, is the intention of the parties when they negotiated and signed their collective bargaining agreement. The parties chose the following words to evidence their agreement regarding arbitration:

> Article XXIII—Arbitration
>
> Any difference, grievance, or dispute between the Company and the Union arising out of, or relating to this Agreement, or its interpretation or application, or the enforcement thereof, except as otherwise specifically provided herein, shall be subject to the following procedure:
>
> A. Any grievance which arises may be taken up by the Union Steward(s) with a representative of the department involved, or with an official of the Company. Grievances must be presented in writing.
>
> B. In the event that the grievance should not have been resolved within three (3) working days, the Business Representative of the Union shall take the subject matter up with the Employer. If the Business Representative of the Union and the Employer cannot reach a satisfactory agreement within three (3) working days, the subject matter shall be referred to arbitration immediately. The arbitrator may be selected by mutual

agreement between the Company and the Union. If no agreement is reached on the selection of the arbitrator within five (5) days, the arbitrator shall be selected from a panel of the American Arbitration Association.

It is to be clearly understood that the Arbitrator shall not have the power to alter any of the terms of the Agreement. Decisions of the Arbitration Board shall be final and binding on both parties. Pending the decision of the Arbitration Board, the Union will not permit any strikes or interferences with the regular routine of business. The cost of the arbitrator shall be borne equally by the parties to this Agreement.

The court below observed that "the preamble clause in and of itself is broad enough to cover the issue of whether there was a violation of the no-strike clause." It then noted Affiliated's contention that "the procedure through which 'any difference, grievance or dispute' must pass provides only for the initiation of Union grievances." The district court concluded, however, that the contract provisions relating to procedure did not "supply the 'positive assurance' requisite to deny the defendant's motion to stay." It held:

After careful study of the arbitration clause presented here as well as the cases which have attempted to interpret similar clauses, we are unable to ascertain the true intent of the parties and therefore hold that since it is not certain that the company's claim for damages resulting from a violation of the no-strike clause is not subject to arbitration, the Union's motion to stay must be granted.

The principle that doubt should be resolved in favor of arbitration does not relieve a court of the responsibility of applying traditional principles of contract interpretation in an effort to ascertain the intention of the contracting

parties.[3] When a contract, fairly read with these principles in mind, is susceptible of a construction that dictates arbitration, the congressional policy favoring that form of dispute resolution may require the denial of judicial relief despite the possibility of fairly reading the contract to evidence a contrary intent.[4] But, there is no occasion to resort to this congressional policy in a case where the contract, fairly read as a whole, is not susceptible of a construction that the parties bound themselves to arbitrate the dispute before the court. We conclude that this is such a case.

It is, of course, well established that contract language must be read in context and that "a subsequent specification impliedly limits the meaning of a preceding generalization."[5] A careful reading of this agreement and an application of these principles to it, lead us to the firm conviction that the parties bound themselves to arbitrate only employee grievances. Article XXIII does not state that "any difference, grievance or dispute . . . arising out of, or relating to this agreement, or its interpretation or application or the enforcement thereof" shall be the subject of arbitration. Rather it provides that any such difference, grievance or dispute "shall be subject to the following procedure." The procedure that follows, as articulated in paragraphs A and B can fairly be read only as applying to employee grievances.

These paragraphs specify three successive steps in an arbitration process. "The grievance" referred to in the first sentence of paragraph B must be the written griev-

3. G. T. Schjeldahl Co. v. Local Lodge 1680, 393 F.2d 502, 505 (1st Cir. 1968); Boeing Co. v. International Union, 370 F.2d 969 (3rd Cir. 1967); Illinois Bell Telephone Co. v. Local Union No. 399, 330 F. Supp. 303 (S.D. Ill. 1971).

4. We are not here presented with the question of whether and under what circumstances a district court should consider tendered evidence other than the contract itself in attempting to determine whether there is "positive assurance" that arbitration was not contemplated by them. *See* Strauss v. Silvercup Bakers, Inc., 353 F.2d 555 (2nd Cir. 1965).

5. G. T. Schjeldahl Co. v. Local Lodge 1680, 393 F.2d 502, 505 (1st Cir. 1968).

ance presented pursuant to paragraph A and the third party-arbitrator provisions of the second sentence of paragraph B, read in context, must refer to grievances unresolved after the two preceding steps.

Initially, any grievance "may be taken up by the Union Steward(s) with a representative of the department involved, or with an official of the Company." At the second stage, "the Business Representative of the Union shall take the subject matter up with the Employer." Thus, at both stages the initiative is with the union. It would be a strained construction at best which would attribute to the parties the thought that a company official would refer an *employer's* grievance to a union steward who would, in turn, refer the grievance to "a representative of the department involved" or to "an official of the company".

In short, we think it may be said with positive assurance, as in *Atkinson*, that the arbitration clause of this collective bargaining agreement is not susceptible of a fair construction that the parties bound themselves to arbitrate employer grievances of the kind here involved.[6]

. The order of the district court granting appellee's motion to stay will be vacated and this case will be remanded for further proceeding consistent with the views we have here expressed.

ADAMS, *Circuit Judge*, dissenting:

A different understanding of the mandate of United Steelworkers of America v. Warrior & Gulf Nav. Co.[1] and the application of that mandate to the present case compels this dissent.

The district court, confronted with the employer's suit seeking damages from the union for violation of a no-strike

6. *Cf.* Boeing Co. v. International Union, 370 F.2d 969 (3rd Cir. 1967); G. T. Schjeldahl Co. v. Local Lodge 1680, 393 F.2d 502, 505 (1st Cir. 1968).

1. 363 U.S. 574 (1960).

clause, stayed that action pending arbitration.[2] The majority, holding that the terms of the collective bargaining agreement did not require the employer to submit its claim to arbitration, reversed the district court. I believe that the collective bargaining agreement, read with the admonitions of *Warrior & Gulf* firmly in mind, requires that this dispute be submitted to arbitration. Therefore, I would affirm the district court.

As the majority points out, the arbitration clause of the collective bargaining agreement controls the determination whether or not a particular type of dispute is to be arbitrated.[3] Explicit language in the agreement committing a question to arbitration or withholding it from arbitration is determinative.[4] It is in the absence of such specificity that problems arise. Such is the situation here.

Warrior & Gulf states the Supreme Court's basic understanding of Congress' philosophy in favor of resolution of disputes through the machinery of arbitration.[5]

To achieve the Congressionally required end, the Supreme Court has promulgated strict rules for the interpretation of the collective bargaining agreement.

> "Apart from matters that the parties *specifically exclude,* all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement."[6]

. . .

2. The damages claimed by the employer are for injury suffered from a strike occurring between November 1, 1971 and November 3, 1971.

3. *See* Atkinson v. Sinclair Refining Co., 370 U.S. 238 (1962) quoted by the majority.

4. *See* Independent Oil Workers at Paulsboro, N.J. v. Mobil Oil Corp., 441 F.2d 651 (3d Cir. 1971). In that case, this Court stated that the presence of a clause which provided that "'nothing in this agreement shall prevent' application to a court of competent jurisdiction" operates as "an 'escape' clause which nullifies the mandatory terms of the earlier language and makes arbitration optional." *Id.* at 653-4.

5. United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960).

6. *Id.* at 581. (Emphasis added.)

> "An order to arbitrate the particular grievance should not be denied *unless it may be said with positive assurance* that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.[7]
>
> . . .
>
> "In the absence of any express provision excluding a particular grievance from arbitration, we think *only the most forceful evidence of a purpose to exclude* the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad."[8]

Rules of contract construction applicable in a normal commercial context are to be eschewed in the interpretation of the arbitration clause of a collective bargaining agreement.[9]

It is against these dictates of *Warrior & Gulf* that the arbitration clause of the collective bargaining agreement in issue must be measured. First, Article XXIII is titled "Arbitration," not "Grievance Procedure."[10] Second, the preamble of Article XXIII, by its terms, includes "Any difference, grievance, or dispute between the Company and the Union. . . ." However, as the majority points out, the procedures outlined in paragraphs A and B of Article XXIII appear to be directed towards the resolution of employee grievances. Applying "traditional principles of contract interpretation," the majority concludes that the presence of the detailed procedure gives "positive assur-

7. *Id.* at 582-3. (Emphasis added.)

8. *Id.* at 584-5. (Emphasis added.)

9. The Supreme Court in Warrior & Gulf stated:

"In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here." *Id.* at 578.

10. *Compare* G. T. Schjeldahl Co. v. Local Lodge 1680, International Association of Machinists, 393 F.2d 502 (1st Cir. 1968).

ance" that the arbitration clause "is not susceptible to a fair construction that the parties bound themselves to arbitrate employer grievances of the kind here involved." I do not believe that *Warrior & Gulf* states that such a construction is dispositive. Rather, it appears to command that the arbitration clause be "not susceptible of *an* interpretation that covers the asserted dispute." (Emphasis added). The clause in question here, I believe, is susceptible to *an* interpretation that would cover the matter in dispute.[11]

Under the majority's interpretation of the arbitration clause of the collective bargaining agreement, only employee grievances would be included within the arbitration process. This would exclude all differences, grievances and disputes raised by the employer. Yet, these items are explicitly included in the arbitration Article. Such a cabined construction would appear to be a limitation on the arbitration article arguably not warranted by the language of the Article. Indeed, the thrust of the preamble, as well as its specific language, indicates a more spacious role for arbitration. While the majority's interpretation might be the better one were ordinary rules of contractual construction applicable, the teachings of *Warrior & Gulf* require that if an ambiguity exists, and I believe that there is such an ambiguity, the clause must be interpreted to remit the parties to arbitration.

Analysis of cases dealing with the question of the sweep of an arbitration clause reveals that there are available to drafters of collective bargaining agreements an

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11. To the extent that the majority relied on language in this Court's opinion in Boeing Co. v. International Union, 370 F.2d 969 (3d Cir. 1967), for the proposition that a "fair construction" of the provision is the standard, I believe such reliance to be misplaced. First, the Supreme Court in *Atkinson v. Sinclair Refining, supra,* found that, regarding the arbitration clause in question there, "We think it unquestionably clear that the contract here involved is not susceptible to *a* construction that the company was bound to arbitrate." 370 U.S. at 241. (Emphasis added.)

Moreover, this Court, in *Boeing,* held that "the arbitration clause is not susceptible of *a* construction that the plaintiff was bound to arbitrate." 370 F.2d at 971. (Emphasis added.)

apparently limitless variety of combinations of headings, inclusions, exclusions and procedures. Detailed discussion of these cases is not fruitful in connection with our problem. Similarities to the present case and differences from the present case can be found in opinions holding that questions are within the arbitration clause and those holding that a question is without.[12] The conclusion that may properly be drawn is that each arbitration clause must be examined independently, with the mandates of *Warrior & Gulf* firmly in mind. Having done this, I believe that the issue raised in the district court is within the scope of the arbitration article of collective bargaining agreement present here.

Accordingly, I respectfully dissent.

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12. *See* Atkinson & Sinclair Refining Co., 370 U.S. 238 (1962); Drake Bakeries Inc. v. Local 50, American Bakery & Confectionery Workers International, 370 U.S. 254 (1962); Independent Oil Workers at Paulsboro, N.J. v. Mobil Oil Co., 441 F.2d 651 (3d Cir. 1971); Boeing Co. v. International Union, 370 F.2d 969 (3d Cir. 1967); G. T. Schjeldahl Co. v. Local Lodge 1680, 393 F.2d 502 (1st Cir. 1968).

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APPENDIX B

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL No. 71-513

AFFILIATED FOOD DISTRIBUTORS, INC.,

Plaintiff,

v.

LOCAL UNION NO. 229, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Defendant.

Memorandum and Order

This is an action by an employer pursuant to § 301 of the Labor Management Relations Act of 1947 (29 U.S.C. § 185 (1965)) for damages sustained as a result of an allegedly illegal work stoppage occurring on November 1, 1971 at Affiliated Food Distributors' place of business in Scranton, Pennsylvania. The work stoppage is alleged to have been in violation of a no-strike provision contained in the collective bargaining agreement by and between Affiliated Food Distributors and Local 229, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, collective bargaining representative of the employees of Affiliated Food Distributors.

The Union has filed a motion to dismiss or, in the alternative, to stay this proceeding pending arbitration of the substantive issues. The court must, therefore, look to the

agreement itself to ascertain whether it requires mandatory arbitration of the claimed violation of the no-strike provision by the Union since it is apparent that the parties cannot agree upon their intention in that regard.[1]

The controversy is by no means unique. It has arisen quite frequently in suits of this nature and although the decision in each case, to varying degrees, has been de-

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[1] The relevant contractual language provides:

"ARTICLE XXIII—ARBITRATION

"Any difference, grievance, or dispute between the Company and the Union arising out of, or relating to this Agreement, or its interpretation or application, or the enforcement thereof, except as otherwise specifically provided herein, shall be subject to the following procedures:

"A. Any grievance which arises may be taken up by the Union Steward(s) with a representative of the department involved, or with an official of the Company. Grievance must be presented in writing.

"B. In the event that the grievance shall not have been resolved within three (3) working days, the Business Representative of the Union shall take the subject matter up with the Employer. If the Business Representative of the Union and the Employer cannot reach a satisfactory agreement within (3) working days, the subject matter shall be referred to arbitration immediately. The arbitrator may be selected by mutual agreement between the Company and the Union. If no agreement is reached on the selection of the arbitrator within five (5) days, the arbitrator shall be selected from a panel of the American Arbitration Association.

"It is to be clearly understood that the arbitrator shall not have the power to alter any of the terms of the Agreement. Decisions of the Arbitration Board shall be final and binding on both parties. Pending the decision of the Arbitration Board, the Union will not permit any strikes or interference with the regular routine of business. The cost of the Arbitrator shall be borne equally by the parties to this Agreement."

pendent upon the wording of the arbitration clause contained in the particular contract involved therein,[2] it has been universally agreed that the following liberal rule of construction promulgated by the Supreme Court must control our decision. "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960). "In the absence of any express provision *excluding* a particular grievance from arbitration . . . only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *Id.* at 584-85. (Emphasis supplied)

In light of the above, we turn to the arbitration clause of the instant contract which provides:

"ARTICLE XXIII—ARBITRATION

> "Any difference, grievance, or dispute between the Company and the Union arising out of, or relating to this Agreement, or its interpretation or application, or the enforcement thereof, except as otherwise specifically provided herein, shall be subject to the following procedures."

The procedures subsequently outlined provide means whereby the Union Steward may initiate the grievance

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[2] *Compare G. T. Schjeldahl Co. Packaging Mach. Div.* v. *Local Lodge 1680, Etc.*, 393 F.2d 502 (1st Cir. 1968); *Boeing Co.* v. *Int'l Union, U.A.A. & A. Implement Wkrs.*, 370 F.2d 969 (3d Cir. 1967), *with Drake Bakeries* v. *Bakery Wkrs.*, 370 U.S. 254 (1962) [*and*] *ITT World Communications, Inc.* v. *Communications Wkrs.*, 422 F.2d 77 (2d Cir. 1970); *Yale & Towne Mfg. Co.* v. *Local Lodge No. 1717, Etc.*, 299 F.2d 882 (3d Cir. 1962).

procedure by presenting a written grievance to "a representative of the department involved or with an official of the Company." If the grievance cannot be resolved within 3 days thereafter, the Union Business Manager is to discuss the grievance with the employer. The clause then provides, "[i]f the Business Representative of the Union and the Employer cannot reach a satisfactory agreement within three (3) working days, the subject matter shall be referred to arbitration immediately."

It is clear that the preamble of the clause in and of itself is broad enough to cover the issue of whether there was a violation of the no-strike clause. However, Affiliated Food Distributors contends that the procedure through which "any difference, grievance or dispute" must pass provides only for the initiation of Union grievances and that arbitration is to be invoked only if the grievance procedure cannot resolve the controversy.

A similar argument was made in this district before our colleague Judge Muir in the case of *Supermarket Service Corp.* v. *General Drivers & Helpers Local Union 229 Etc.* (M.D.Pa. C.A. No. 72-44). Judge Muir there rejected the argument as failing to "supply that 'positive assurance' requisite to deny the defendant's motion to stay these proceedings." We agree. At best the company's interpretation creates an ambiguity which, as the Supreme Court has consistently suggested, should be resolved in favor of arbitration. *United Steelworkers of America* v. *Warrior & Gulf Navigation Co., supra.*

Article XXIII of the collective bargaining agreement is on its face vague and uncertin. Whether this uncertainty is intentional or simply the result of poor draftsmanship need not concern us. However, when faced with the task of interpreting such a clause, we are of the opinion that

the court should simply resolve all doubts in favor of arbitration rather than strain to construe its language to conclude that it can ascertain the true intent of the parties.

After careful study of the arbitration clause presented here as well as the cases which have attempted to interpret similar clauses, we are unable to ascertain the true intent of the parties and therefore hold that since it is not certain that the company's claim for damages resulting from a violation of the no-strike clause is not subject to arbitration, the Union's motion to stay must be granted.[3]

The company also contends that the Union has waived its right to demand arbitration by failing to petition the court to stay this action before the parties participated in the arbitration concerning the underlying grievance precipitating the work stoppage thereby unnecessarily subjecting the corporation to a second arbitration proceeding.[4]

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[3] *Drake Bakeries* v. *Bakery Wkrs.*, 370 U.S. 254 (1962) requires only that the action for damages be stayed pending arbitration; it does not require dismissal of the suit.

[4] The United States Arbitration Act, in § 3 of Title 9 (1965) provides:

> "Stay of proceedings where issue therein referable to arbitration
>
> "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

The act has been held to be part of the federal law which may be resorted to in implementing federal policy in labor relations. *Inter-Continental Engine Service, Inc.* v. *Int'l Assoc. of Machinists, Etc.*, 305 F.Supp. 577 (S.D.Tex. 1969).

The corporation's damage suit was initiated on November 18, 1971. On December 14, 1971 the Union filed its answer and the motion to dismiss which is now before the court. The corporation, however, was not served with these pleadings until December 22, 1971. On December 27, 1971 the parties arbitrated the underlying grievance. The corporation was, therefore, aware of the Union's desire to arbitrate the issue of whether it had violated the no-strike clause five days before the scheduled arbitration, and the corporation could have taken appropriate steps to submit that issue to the arbitrator if it so desired.

Surely it cannot be contended that the Union was under an affirmative duty to request arbitration before the time when it was required to file its pleadings in response to the corporation's complaint. Notwithstanding the 8-day delay in serving the corporation with the answer and motion to dismiss, the Union's action cannot be held to constitute a default inasmuch as the corporation was notified of the Union's desire to arbitrate before the December 27th arbitration and was therefore not prejudiced by the delay. *See, ITT World Communications, Inc.* v. *Communications Wkrs.*, 422 F.2d 77 (2d Cir. 1970). The corporation has vehemently opposed arbitration of the substantive issues involved in this suit, and we fail to see how the controversy could have been resolved by an adverse proceeding in time to submit the matters to the December 27th arbitration even if the Union had requested a stay immediately upon service of the corporation's complaint.

Moreover, assuming arguendo that five days notice was not sufficient time for the company to prepare the no-strike clause violation issue for the December 27th arbitration, had it desired to do so, and that the company is now being subjected to a second proceeding, we do not

feel that the resulting prejudice to the company warrants a finding of waiver on the part of the Union.

An order granting the defendant's motion to stay pending arbitration will be entered.

R. Dixon Herman
R. Dixon Herman
United States District Judge
Middle District of Pennsylvania

Dated: July 10th, 1972.